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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 934

AMERICAN EASTERN CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 8, 1956.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Eastern Corporation, a New York corporation, with its principal place of business in New York City, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered in the above case on April 19, 1956.

OPINIONS BELOW AND JURISDICTION

The opinions of the United States District Court for the Southern District of New York are reported at 133 F. Supp. 11 and are reproduced at pp. 57a and 82a of Appendix A.*

* Appendices A and B, printed for the use of the Court of Appeals, are furnished herewith pursuant to paragraph 3 of Rule 36 of the rules of this Court. Appendix C, submitted herewith, sets forth respondent's appendix and the judgment in the Court of Appeals. Appendix D, also herewith, contains excerpts from Maritime's regulations, instructions and correspondence showing its position that the date of final audit was the time agreed upon for performance of the obligation to refund overpayments of additional charter hire. The opinion of the Court of Claims in *Smith-Johnson Steamship Corp.* v. *United States* is also included in Appendix D.

The *per curiam* opinion of the Court of Appeals for the Second Circuit (not yet reported) is as follows:

> The decision of Judge Walsh, D.C. S.D.N.Y., 133 F. Supp. 11, is affirmed. *Archawski* v. *Hanioti*, U.S., April 9, 1956; *Sword Line* v. *United States*, 2 Cir., Feb. 24, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner bareboat chartered two vessels from the Maritime Commission ("Maritime") from April 10, 1947, the date of delivery of the first vessel under charter, until June 16, 1948, date of redelivery of the last. The charters were made under section 5 of the Merchant Ship Sales Act of 1946, which provided for a basic charter hire of 15 percent of the statutory sales price of the vessels. Section 5 also incorporated by reference section 709 of the Merchant Marine Act, 1936, which provided that charterers should pay over to the Government, as "additional charter hire", 50 percent of any profits earned from the operation of the vessels in excess of 10 percent on capital necessarily employed, such profits to be accounted for on a cumulative *calendar year* basis. These sections are set forth in Appendix A, pp. 3a-4a.

Notwithstanding the statutory provision for calendar year accounting, Maritime, in mid-August 1947, required all charterers, including petitioner, as a condition of the continued use of Government vessels, to agree to a modification of the charter to provide for division of the calendar year 1947 into two accounting periods, as of September 1 ("split accounting"), for purposes of computing additional charter hire. Petitioner signed an addendum to the original charter (Foreign Trade Addendum) which provided for such divided accounting. The use of the vessels was uninterrupted.

Between August, 1947 and February, 1948, petitioner made tentative additional charter hire payments of approximately $20,000, based on the preliminary profit figures prepared while the vessels were actually under charter. After the charter operations were terminated, and final audit completed on February 18, 1953, it appeared that, even on the basis of split accounting for 1947, petitioner had overpaid additional charter hire of approximately $10,000. The latter amount was refunded, but Maritime retained the balance, also of approximately $10,000, which likewise should have been refunded upon the basis of an accounting covering the entire calendar year of 1947 in accordance with the statutory mandate, since operations for the entire year resulted in a loss of $80,000.*

The district court, on motion of the Government, summarily dismissed the libel as time barred and thereafter denied petitioner's motion to amend the libel (Appendix A, pp. 67a-77a; 82a-83a). The Court of Appeals affirmed *per curiam* and in effect denied petitioner's motion in that court to reduce the amount claimed to $10,000 so that, if the case were held to be beyond the jurisdiction of admiralty, it could be heard on the law side of the district court under the Tucker Act (Appendix B, pp. 5b-6b).

Three basic questions are presented:

1. Petitioner's cause of action is not grounded upon a breach of the contract of charter, because the charter, as amended by the addendum requiring split accounting for the year 1947, was performed according to its terms. The injury complained of is that the statutory requirement that accountings be on a calendar year basis was violated and

* There was a profit of $20,000 in 1947 prior to September 1, and a loss of $100,000 after September 1. The dispute relates to 50 percent of the $20,000 profit.

that this resulted in overpayment of additional charter hire. *The first question posed, therefore, is whether admiralty has jurisdiction where the maritime contract has not been breached and the suit is founded upon an Act of Congress.* Petitioner claims that this is a cause of action falling within the express terms of the Tucker Act and, since no breach of the maritime contract is involved, it is not within the cognizance of admiralty. The Government contends that the suit is a maritime cause of action founded upon statute and should proceed in admiralty.

2. The instant suit was commenced within two years of the date of Maritime's completion of the final audit of petitioner's accounting, but more than two years after the dates both of redelivery of the chartered vessels, and of petitioner's last payment on account of additional charter hire. *The second question then is, if admiralty properly has jurisdiction, whether petitioner's cause of action is barred by the two-year statute of limitations of the Suits in Admiralty Act.* Petitioner claims that by the express terms of the charter, Maritime's regulations and the course of conduct between the parties, as evidenced by letters from Maritime and other documentation, it was agreed by and between Maritime and petitioner (as well as the other charterers) that the Government's obligation to repay charter hire, exacted contrary to the statute, accrued upon the date of completion of Maritime's final audit of petitioner's charter accounts. The Government on the other hand contends that the statute of limitations commenced to run upon the date of redelivery of the last vessel from under charter.

3. The final question is whether the courts below erred in deciding the time-bar issue merely upon the Government's exceptive allegations, without affording petitioner an opportunity, under the allegations of its libel, to introduce

evidence proving its agreement and understanding with the Government that the obligation to make refunds did not accrue until final audit.

STATUTES INVOLVED

The relevant provisions of the Merchant Ship Sales Act of 1946, 60 Stat. 43, 50 U.S.C. App. 1738; the Merchant Marine Act, 1936, 49 Stat. 2010, 46 U.S.C. 1199; the Tucker Act, 62 Stat. 933, 28 U.S.C. 1346(a)(2); and the Suits in Admiralty Act, 41 Stat. 525, 526, 46 U.S.C. 742, 743 and 745, are set forth in Appendix B (1b-4b).

STATEMENT

This is one of approximately 75 cases * filed in the Court of Claims and the district courts by various steamship companies which, commencing in 1946, bareboat chartered vessels from Maritime under the Ship Sales Act. The suits seek court review of the accountings between the companies and the Government under the profit-sharing requirements prescribed by section 709 of the Merchant Marine Act, 1936. The instant case was brought in the district court as a protective suit against the running of the statute of limitations in the event of a holding that admiralty had jurisdiction.

There are three major issues, all involving the construction of said section 709. The first issue is whether the Government was entitled to take up to 90 percent of the charterer's profits over their express protest, although section 709 limits Government participation in profits to 50 percent. This issue is presented in *Sword Line, Inc.* v. *United States*,

* Of these none have advanced to the point reached by *Sword Line, Smith-Johnson* and the instant case. Many of the cases in the Court of Claims have been suspended on the Government's motion. There are no cases pending in any Court of Appeals.

petition for certiorari filed, April 14, 1956 and concurred in by the Government by memorandum filed April 18, 1956 (Docket Number 861). It is also presented in *Smith-Johnson Steamship Corp.* v. *United States,* ....F. Supp. .... (C. Cls. 1956), petition for certiorari filed, April 24, 1956 (Docket No. 898). The second issue, also present in *Sword Line,* is whether profits and losses in different years may be offset against each other under the "cumulative" accounting provisions of section 709, thus giving the actual cumulative profit results for the duration of the charter.

The third issue, which is not clearly presented in the *Sword Line* case and is the only issue in this case, is whether the division by Maritime of the year 1947 into two parts as of September 1 for accounting purposes ("split accounting") violated the calendar year accounting requirement of section 709.

The charterers base their claims on the fundamental proposition that a Government agency can not, by regulation, contract or otherwise change the plan prescribed by Congress for chartering vessels under the Ship Sales Act, nor can it collect charter hire in excess of that prescribed by Congress. The Court of Claims has held * that Maritime could not lawfully change the statutory plan for the sale of vessels under that Act, and the principles of those cases are equally applicable to charters.

REASONS FOR GRANTING THE WRIT

The writ should be granted because of a conflict between the Second Circuit and the Court of Claims as to admiralty or Tucker Act jurisdiction; because of a conflict within the Second Circuit as to the statute of limitations; and because

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* *A. H. Bull Steamship Co.* v. *United States,* 108 F. Supp. 95 (1952); *Southeastern Oil Florida, Inc.* v. *United States,* 119 F. Supp. 731 (1953), *cert. denied,* 348 U.S. 834 (1954).

the position taken by the Department of Justice as to the statute of limitations is a complete reversal of the position, taken by Maritime and consistently adhered to, upon which the charterers relied.

1. Jurisdiction

(a) *Conflict between Second Circuit and Court of Claims.* The Court of Appeals for the Second Circuit has held that these suits are cognizable in admiralty. *Sword Line* v. *United States,* 228 F.2d 344, decision reaffirmed, 230 F.2d 75 (1956), petition for certiorari filed (Docket No. 861, October Term, 1955). The Court of Claims has, on the contrary, and in the view of petitioner correctly, held that jurisdiction of these claims lies under the Tucker Act. *Smith-Johnson S. S. Corp* v. *United States,* 24 L.W. 2425, ... F. Supp. ... (1956), petition for certiorari filed, April 24, 1956 (Docket No. 898, October Term, 1955).

In *Smith-Johnson* the Court of Claims held that, while the charters were maritime contracts, the actions there were founded not upon the charters but upon statute and were therefore within the jurisdiction of the Court of Claims under the Tucker Act. See Appendix D, page 19.

In the case at bar the Court of Appeals in effect rejected this view, notwithstanding the Government's frequently reiterated admission (see Appendix D, page 18) that the cause of action was one based upon violation of statute. The *per curiam* decision affirmed the district court judgment of dismissal, with no opinion other than a reference to *Sword Line* and *Archawski* v. *Hanioti,* ... U.S. .... (April 9, 1956).

In *Archawski,* this Court held that admiralty has jurisdiction over a quasi-contract "provided that the unjust enrichment arose as a result of the breach of a maritime

contract." And the decision was predicated upon the holding by the Court that the action was one to recover for breach of a contract to transport passengers by sea, clearly a maritime contract.

In *Sword Line* and in the case at bar, however, there was no breach of contract. The contracts in both cases, like those in *Smith-Johnson,* were performed according to their terms, as the Court of Claims in the latter case correctly found. Nevertheless, the Court of Appeals in *Sword Line* resorted to two separate fictions in order to support admiralty jurisdiction. The first of these was that the Government and the petitioner, contrary to the actual facts, had contracted in conformity with the statutory terms. The Court said, 228 F. 2d 344, at 346:

> * * * if the statute did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire. The suit is therefore in quasi contract for money had and received. * * *

The second fiction was the traditional implied promise of *indebitatus assumpsit* to repay moneys which in equity and good conscience should not be retained.

Resort to the first fiction was wholly unnecessary since an action in quasi contract need not be based upon breach of contract. An action for money had and received will lie even where there is no contract at all, e.g., where the taking was tortious. *Untermeyer* v. *Bowers,* 79 F. 2d 9

(C.A. 2, 1935), *cert. denied,* 296 U.S. 641. The fact that the actual agreement between the parties violated the statute and resulted in an overpayment was sufficient to make inequitable the retention of the money so exacted and thus to support the implied promise to repay. Resort to the first fiction was likewise inappropriate since the terms of an express agreement should not be varied to make it say what it does not and cannot mean. *Calmar Steamship Corp.* v. *Scott,* 345 U.S. 427, 435 (1953); *Hedges* v. *Dixon County,* 150 U.S. 182 (1893); *Baltimore & Ohio R. Co.* v. *United States,* 261 U.S. 592, 597 (1923); *Adams* v. *Union Dime Sav. Bank,* 144 F.2d 290, 291, 292 (C.A. 2, 1944), *cert. denied,* 323 U.S. 751.

We think the Court of Claims was patently correct in its *Smith-Johnson* opinion when, referring to the resort to this fiction in *Sword Line,* it said (slip sheet opinion, p. 5, Appendix D, page 24):

> But no such presumption can be indulged in the case at bar, because it is contrary to the facts.

But for this fiction *Sword Line* would not come within the holdings of this Court in *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.* 290 U.S. 117 (1933) and *Archawski* v. *Hanioti, supra.* In *Krauss* the court held that there was a breach of an express maritime contract. But it was argued that this was an action in quasi contract which was not cognizable in admiralty. To this the court replied that, even as an action in quasi contract, it was within the jurisdiction of admiralty because the money was exacted in breach of a maritime contract. The *Archawski* holding was to the same effect.

In the first *Sword Line* opinion, *supra,* Judge Hand stated his view that the *Krauss* decision was limited to the holding that an action in quasi contract was cognizable in admiralty if it was based upon an exaction in breach

of a maritime contract. And he adhered to that view in the second opinion, 230 F.2d 75, 78-79.

Presumably in answer to Judge Hand, Chief Judge Clark took the position that it was sufficient to support admiralty jurisdiction that the underlying transaction was of maritime character. In support of this position he cited a number of cases in which admiralty took jurisdiction of certain statutory questions, 230 F.2d, at 77-78, and stated, id., at p. 76:

> * * * there is no good reason for holding that the court which would decree the payment in the first instance should not decree the repayment which the admiralty law now requires. Logic, as well as convenience, dictates such jurisdiction, rather than the discovery of some narrow distinction to send a litigant elsewhere for perhaps a part of an entire claim. For certainly the claim, together with a natural counterclaim or offset, should properly come up in the same litigation without dismemberment and splitting into two lawsuits separately considered.

We think this position is unsound for the following reasons:

1. Admiralty is a court of limited jurisdiction. If the claim presented is not maritime the maritime character of the underlying transaction will not confer jurisdiction. *Grant* v. *Poillon*, 61 U.S. 162 (1858); *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175 (1837); *Ward* v. *Thompson*, 22 How. 330 (1859); and the cases are legion in which admiralty jurisdiction is wanting notwithstanding the maritime character of the underlying transactions; e.g., an agreement to pay brokerage commissions embodied in a maritime charter; storage ashore of cargo to be discharged from a vessel; storing cargo during the winter on a vessel which carried the cargo; lease of a bar on a vessel; etc. See 1 Benedict, *Admiralty* (Sixth Ed.) 138-142. Even a suit *in rem* to foreclose the mortgage of a

vessel is within admiralty jurisdiction solely by reason of federal statute. (Lien Acts of 1910 and 1920, 46 U.S.C. 971-975, and Preferred Ship Mortgage Act of 1920, 46 U.S.C. 951).

All else apart, it is noteworthy that the charter accounting cases present none of the characteristic maritime problems based upon events afloat or upon the seaworthiness of a vessel or its operation or navigation. All that is here involved is a controversy over an accounting of profits.

2. The fact that the Government might have sued in admiralty to recover payments of additional charter hire due under the terms of the charter* does not justify the conclusion that suits by the charterers to recover overpayments are within the jurisdiction of admiralty. The Government's suit would be based on a withholding of payment in *breach* of a maritime contract. The charterer's action is based upon overpayment exacted *pursuant* to a maritime contract but in *violation of a statute.*

As for the argument of the court below that claims and counterclaims should not be split, the short answer is that the Government is free to present its counterclaims in the Court of Claims (28 U.S.C. 1503). Indeed, that court has broader jurisdiction to consider counterclaims by the Government, than does admiralty, the jurisdiction of which is limited.

Jurisdiction is established by how a case is presented and it is the complainant's pleading that is determina-

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* Petitioner, however, does not concede that such a suit by the Government would be cognizable in admiralty. Such suit would involve nothing more than an accounting of profits, which would not be incidental to any other claim and would, therefore, be beyond admiralty jurisdiction. *Ward* v. *Thompson*, 22 How. 330 (1859); *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175 (1837); *Grant* v. *Poillon*, 61 U.S. 162 (1858); *Swift & Co.* v. *Compania Columbiana*, 339 U.S. 684, 692-693 (1950).

tive. *Healy* v. *Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915); *Osborne* v. *Bank of the United States*, 9 Wheat. 738, 824 (1824); *Peyton* v. *Railway Exp. Agency*, 316 U.S. 350, 353 (1942). And an issue which, when raised by way of defense will not divest admiralty of jurisdiction, will not necessarily support jurisdiction in the first instance. *Swift & Co.* v. *Compania Colombiana del Caribe*, 339 U.S. 684, 692 (1950).

3. The cases cited by the Court below involving admiralty jurisdiction of statutory issues are clearly distinguishable. Apart from the cases in which the statutory action was traditionally within admiralty jurisdiction, such as the pilotage and maritime lien cases, reliance is placed upon the Harter Act cases. But in the latter group, the suit is not brought under the Harter Act. The cause of action is for negligence in the handling of a ship, use of an unseaworthy ship or for damage to or shortage of cargo. These are all basically maritime causes. The defense, however, is that a contract provision limits liability and, by way of reply, the Harter Act is relied upon as making illegal the contractual limitation of liability. Having jurisdiction of the basic issue, admiralty is not divested of jurisdiction by the interposition of an incidental statutory issue.

It by no means follows, however, that admiralty would have jurisdiction where the cause of action is itself founded upon a statute. Indeed, the precedents are to the contrary. *Prince Line* v. *American Paper Exports*, 55 F.2d 1053 (C.A. 2, 1932); *Alcoa S. S. Co.* v. *United States*, 80 F. Supp. 158 (D.C S.D.N.Y., 1948), rev'd. on other grounds, but without questioning Tucker Act jurisdiction, 175 F.2d 661, aff'd., 338 U.S. 421; *Eastport Steamship Co. v. United States*, 130 F. Supp. 333 (C. Cls., 1955); *Kaufman* v. *John Block & Co.*, 60 F. Supp. 992 (D.C. S.D.N.Y., 1945).

We submit, therefore, that the court below erred and that the *Smith-Johnson* holding was clearly correct.

(b) *The need for prompt settlement of the jurisdictional issue.* The Suits in Admiralty Act has a two year statute of limitations; under the Tucker Act the limitation is six years. Furthermore, the provisions of 28 U.S.C. 1500 cast doubt upon the status of protective suits pending concurrently in the Court of Claims and in admiralty. It is therefore desirable that the jurisdictional issue be promptly settled so that suits brought in one forum should not be time barred in the other if the latter is held to be the appropriate one. The Government, by its memorandum concurring in the *Sword Line* petition recognizes these various problems, and the need for clarification by this Court is not a matter of controversy between the parties.

As pointed out above, petitioner's claim here concerns one of the three basic controversies involved in the pending suits by charterers. The jurisdiction point with respect to the split accounting issue should be resolved along with the other two types of claims which are involved in *Sword Line* and *Smith-Johnson.* Consequently, it would be desirable that the three cases be presented to, and considered by, the Court at the same time.

2. Statute of Limitations

(a) *Conflict within the Second Circuit.* The Court of Appeals in its *Sword Line* decision, which it followed in this case, held that the cause of action accrued at the date of redelivery to the Government of the last vessel under charter. Judge Hand (who wrote the original opinion), however, dissented and agreed with the charterers that under clause 13 of the charter (hereinafter discussed) the

statute of limitations did not begin to run until the date of final audit by Maritime of the accounts of the charterers. 228 F.2d, at 347. There was thus a conflict within the Second Circuit of vital importance to the charterers' contentions, which justifies review by this Court.

(b) *Petitioner's position.*

Petitioner urges, as it did below, that the charter agreement, Maritime's regulations and its course of dealing with the charterers clearly spelled out an agreement and understanding that all payments on account of additional charter hire made prior to final audit were tentative and preliminary, that final payments by the charterers to Maritime and refunds of overpayments shown to have been made by the charterers were to become due and payable at the date of completion of final audit and that all rights of the Government and the charterers were reserved until that date.

In Article Eighth of its proposed amended libel (Appendix A, pp. 74a-75a) petitioner alleged:

> EIGHTH: Detailed accounting rules and regulations were promulgated by the Commission and were made applicable to the charter between Libelant and the Commission. Such rules and regulations, as well as the specific provisions of Clause 13 of the Charter, provided for the submission of periodic financial statements covering the operation of the vessels, and for payment on account to the Commission of a portion of the amounts thus indicated to be due. It was expressly provided that all accountings submitted by Libelant were tentative and preliminary as respects both Libelant and Respondent, and were subject, first to initial audit as submitted, and thereafter to final audit after operations under the charter were terminated and all items of expense and income were known.

> Under the express provisions of the charter between Libelant and Respondent, the regulations and instructions issued by Respondent, and the audit procedures established by the Commission, the accountings for charter hire were intentionally and deliberately kept open and it was agreed by both the Government and the charterer that all rights and controversies were reserved for final determination by the Administration or by judicial process after completion of final audit of the accounts by the Commission.

The issue with respect to the agreement alleged in the libel was one as to which proof should have been taken and summary disposition thereof was not appropriate. *Pacific-Atlantic Steamship Co.* v. *United States*, 127 F. Supp. 931 (D.C. Del., 1955); *Fireman's Fund Ins. Co.* v. *U. S. A. LST 34*, 132 F. Supp. 414 (D.C. S.D.N.Y., 1955); *Benevento* v. *United States*, 68 F. Supp. 347 (D.C. S.D.N.Y., 1946), aff'd, 160 F. 2d 487; *Roah Hook Brick Co.* v. *Erie R. Co.*, 64 F. Supp. 288 (D.C. E.D.N.Y., 1945); *Reconstruction Finance Corp.* v. *The Pueblo*, 97 F. Supp. 2 (D.C. S.D.N.Y., 1951); *King Edward Employees F. C. U.* v. *Travelers Indem. Co.*, 206 F. 2d 726 (C.A. 5, 1953); *Frederick Hart & Co.* v. *Recordograph Corporation*, 169 F. 2d 580 (C.A. 3, 1948); *Colby* v. *Klune*, 178 F. 2d 872 (C.A. 2, 1949); *Wilmington Trust Co.* v. *Travelers Ins. Co.*, 109 F. Supp. 487, 491 (D.C. Del., 1956). The district court, however, sustained the Government's exceptions on summary motion and dismissed the libel. This, we submit, was reversible error.

Nevertheless, even on the summary motion, there was sufficient evidence before the court to clearly establish the agreement alleged in the libel.

(1) *The charter, Maritime's regulations and course of dealing.* Clause 13 of the charter (Appendix A. page 6a) plainly stated:

> That such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment * * * upon the completion of each final audit by the Owner, at which times * * * such overpayments [will be] refunded to the charterer as may be required.

Maritime's regulations repeatedly confirmed that the preliminary payments were tentative, and were subject to adjustment upon final audit and that refunds of overpayments would be made upon final audit. See 46 C.F.R. 299.31 (k)(1); 46 C.F.R. 299.37-2(a)(1); 46 C.F.R. 299.37-2(b)(3). And a Maritime regulation further stated:

> That if, in any instance, the rules and regulations prescribed herein should *conflict with the provision of an applicable statute* or agreement, *such provisions shall govern.* (Emphasis supplied, 46 C.F.R. 299.37-7(3).)

The foregoing leaves little doubt as to the existence of the agreement as alleged by petitioner. Had the issue of the existence of the agreement been left for trial, as it should have been, petitioner had available and could have submitted letters from Maritime to petitioner and other charterers in which Maritime stated its position with respect to the tentative nature of payments made prior to the date of final audit and the reservation of all rights to that date. See, for example, Appendix A, pp. 48a-49a; Appendix B, pp. 16b, 21b, and Appendix D, pp. 13-17. And petitioner would also have called responsible Maritime officials to testify as to the existence of the agreement.

(2) *The deposit of preliminary payments in a trust account.* Further evidence of the agreement is found in the fact that preliminary payments of charter hire were deposited by Maritime in a special "unearned moneys"

trust account from which refunds of additional charter hire were made. The General Accounting Office has held that these preliminary payments were not earned moneys and were not required to be deposited in the treasury to the credit of miscellaneous receipts under section 12(d) of the Merchant Ship Sales Act of 1946. See 33 Decisions, Comptroller General, 503, 504 (April 22, 1954).

Beyond establishing that the preliminary payments of charter hire were intended to be and were treated as tentative payments, this brings the instant case within the holding of *Rosenman* v. *United States*, 323 U.S. 662-3 (1954), that moneys so held were not payments for the purpose of starting the running of the statute of limitations. See also *United States* v. *Ohio Oil Co.*, 163 F.2d 633, (C.A. 10, 1947), *cert. denied*, 333 U.S. 833.

(3) *Petitioner's cause of action accrued on the date agreed upon for refund.* While it is elementary that damages flowing from breach of contract need not be liquidated or ascertained before the statute of limitations commences to run, it is equally elementary that where the parties have agreed that performance by either shall be due upon the occurrence of a subsequent event (such as completion of final audit, which is clearly shown to be the intent here) the statute of limitations commences to run at the time fixed by the contract for performance and not earlier. 4 Corbin, *Contracts* (1951), sec. 943; *Dingley* v. *Oler*, 117 U.S. 490 (1886); *W. R. Grace & Co.* v. *Ford Motor Co. of Canada*, 278 Fed. 951 (D.C. Cal., 1921), aff'd., 278 Fed. 955. *Austin Engineering Co.* v. *United States*, 88 C. Cls. 559 (1939); *United States* v. *Wurts*, 303 U.S. 414 (1938); cf., *Meyerle, Exr.* v. *United States*, 33 C. Cls. 1 (1897). Even *United States* v. *Atlantic Mutual Ins. Co.*, 298 U.S. 483 (1936), relied upon by the Government, recog-

nizes that the statute of limitations begins to run from the date agreed upon for performance. The court said, at page 491, "In the absence of some stipulation on the subject, and there was none, * * *" the preparation of an adjuster's statement did not affect the running of the statute of limitations against a general average claim.

An exception to the rule that the cause of action accrues at the time fixed for performance is the case of anticipatory breach of contract. But it is well settled that the aggrieved party is not obliged to act upon the anticipatory breach and may await the time fixed for performance, thus affording the other party an opportunity to perform according to his obligation. *Roehm* v. *Horst*, 178 U.S. 1 (1899); *Foss-Schneider Brewing Co.* v. *Bullock*, 59 Fed. 83 (C.A. 6, 1893); *Hochster* v. *De la Tour*, 2 El. & Bl. 678 (1853); Restatement of Contracts, Section 322 and last sentence of comment (d) on Section 318.

Petitioner paid the Government $10,000 more of additional charter hire than it was required to pay. The Government agreed to refund such overpayment at final audit, and, failing refund at that time, petitioner's right to sue then accrued.

(4) *There was a mutual open account between the parties.* It was Judge Hand's view, with which his colleagues did not agree, that there was a mutual open account as to which the statute did not begin to run until the date of final audit. 228 F.2d, at 347-348. He predicated this conclusion upon the agreement to make adjustments upon final audit, under which agreement the balance either way was not due until the adjustments had been made. We think his position sound not only for the reasons stated but for an additional reason as well.

The account contemplated and actually included cross items to and from the charterer and the Government. Thus, while the charterer was obligated to make payments of basic hire and additional charter hire, the Government was obliged to pay for consumable stores and inventory on board the vessels at time of redelivery. (Appendix A, pages 19a-20a). The account between petitioner and Maritime includes the following cross payments:

Date		*Payments by petitioner*	*Payments by Maritime*
8/ 4/47	Preliminary charter hire	$1,773.43	
9/ 2/47	" " "	6,537.54	
1/ 6/48	" " "	6,471.94	
2/16/48	" " "	4,459.71	
4/25/52	Refund		$8,436.40
3/12/53	Refund (a/c consumable stores & expendable equipment)		603.60

When petitioner took delivery of each chartered vessel it was charged for the consumable stores and expendable equipment then on board. When the vessels were redelivered the Government was charged therefor. Payment of the difference was made by the one to the other depending upon whether the value at redelivery was greater or less than at delivery. In this case the balancing of the consumable stores and expendable equipment accounts resulted in a charge to petitioner of $1,207.20, which became an expense item reducing profits by the same amount and resulting in the refund of $603.60, the last item in the above schedule.*

* So also in *Sword Line*, the Government's proof of claim in bankruptcy (p. 22a, Appellant's Brief and Appendix in the Court of Appeals, *Sword Line, Inc.* v. *United States*) stated "That there are no set-offs or counter-claims to said debt except the

There was thus a two-way open account and the statute of limitations did not begin to run until the date agreed upon for the balancing of accounts. *Judson* v. *Buckley*, 130 F.2d 174, 183 (C.A. 2, 1942), *cert. denied*, 317 U.S. 679.

(5) *Audit Procedures.* Maritime has laid down extensive audit procedures to determine the share of profits properly allocable to the Government. Petitioner followed these procedures to final audit, as did other charterers. These procedures called for periodic accountings culminating in the final audit and implicitly recognize that long periods of time necessarily elapse before it is possible to ascertain the final profit from a water-carrying venture. It sometimes takes years before claims for injuries and cargo damage or loss are disposed of or even ascertained. As a result, it is impossible to reach a final determination of actual profit for several years after redelivery of the vessels.

Thus, there were 184 charter agreements between Maritime and various companies. Final audits of very few of these have been completed (Appendix B, pp. 8b-15b) and delay in accounting has been attributable in large measure to Maritime's failure to issue its regulations governing the accountings.* These accountings will extend for sev-

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amount of $1,025,303.09 represented by court judgments, *compensation, redelivery inventories, and miscellaneous items due the debtor* [Sword] from the United States Maritime Commission." (Emphasis added).

* The 1955 Annual Report of the Attorney General, discussing the statute of limitations question in the charter accounting cases, states, at page 214:

> The question was seriously complicated by many factors, such as the failure of Maritime to complete final auditing and to publish accounting regulations until comparatively recently.

eral years at least. Maritime's audit procedures contemplated that adjustments would be made from time to time as the profit figures changed by reason of new entries of income or expense.

But the holding below that the statute of limitations runs from the date of redelivery of the last vessel frustrates the purpose of the orderly audit procedures. To protect their rights charterers will be forced into litigation, as some already have been, over issues which may prove academic by the time of final audit. Thus, in the case at bar, petitioner's obligation on account of additional charter hire was reduced by the date of final audit from $20,000 to $10,000 even on the basis of the split accounting. If the obligation had been reduced to zero or to some insignificant amount, as well might have been the case, there would have been no damage calling for litigation of the issue over the split year accounting. But under the holding below, petitioner could protect itself only by instituting suit long before it could know for certain whether it would suffer any damage.

The holding below will make inevitable much litigation that would otherwise prove to be unnecessary. It will also thrust upon the courts the burden of adjusting accounts between the parties, and in many cases make futile further compliance with Maritime's auditing procedures.

(c) *Injustice to charterers in Government's reversals of position.* As already pointed out, Maritime has consistently taken the position that all disputes and rights with respect thereto were reserved to the date of final audit on which date the obligation to make refund of overpayments accrued. Indeed, it has consistently insisted as it still does, that charterers make preliminary payments of additional charter hire on its accounting theories, giv-

ing them *written* assurances, based on clause 13 of the charters, that their payments are without prejudice and that their rights to recover any overpayments are reserved for determination at date of final audit. See Appendix D, pp. 15-17.

The Department of Justice, on the other hand, takes the position that the statute of limitations began to run from the date of redelivery of the last vessel. In cases now in litigation it is urging that the statute of limitations began to run from the date of redelivery even with respect to preliminary payments of additional charter hire made after redelivery.* This reversal of position, after many charterers had relied upon Maritime's agreement and frequently reiterated assurance that all rights were reserved to final audit, works a serious injustice upon the charterers and raises a serious question of Governmental policy.

Judicial approval of this reversal of position has the effect of making refunds by Maritime of moneys *admittedly due* a matter of grace rather than right. In this case the date of redelivery of the last vessel was June 16, 1948. More than two years after that date Maritime made two refunds to petitioner totalling $9,040. If the statute of limitations ran from the date of redelivery, Maritime need not have made these refunds since petitioner's right to sue therefor was time barred, notwithstanding that the facts on the basis of which the refunds were made were not ascertained until accountings made long after redelivery.

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* This argument has been made in *Sprague Steamhip Company* v. *United States,* Admiralty No. 53-80-F (D.C. Mass.) and in *American-Foreign Steamship Corporation* v. *United States,* Admiralty No. 183-356, and ten other cases in the Southern District of New York. In many of these cases payments were made more than two years after redelivery and the Government is arguing that, under *Sword Line,* these payments were time-barred *before they were made.*

The holding below, coupled with the Government's procedural maneuvers, subject the charterers to a further dilemma. For example, in *Atlantic Carriers, Inc.* v. *United States,* 131 F. Supp. 1 (D.C. S.D.N.Y., 1955), where the libelant had chartered a vessel to the Government, the charter contained a disputes clause providing that any unsettled dispute "concerning a question of fact arising under this contract" should be determined by the Government contracting officer with right of appeal to the Secretary. The vessel was redelivered to libelant in allegedly damaged condition. Fearing the running of the two-year statute of limitations, libelant filed a protective suit while in the process of presenting its claims to the contracting officer. It was not pressing its suit and represented both to the Government and the court that it would not require the Government to plead until proceedings at the administrative stage were completed. Nevertheless, the Government insisted that the cause of action *would not arise until the administrative process was completed* and that the suit was, therefore, *premature.* The libel was dismissed.

Wary and fortunate will be the claimant who successfully avoids both prematurity and tardiness, the twin horns upon which the Government intends that his claim be impaled before the merits can be reached.

(d) *Decision by this Court in the Sword Line case will not properly dispose of the statute-of-limitations question. Sword Line* is not typical with respect to the question of statute of limitations and that question is not present at all in *Smith-Johnson.* Decisions by this Court in those cases would not necessarily afford guidance to charterers generally with respect to the future course of the charter accounting litigation.

For example, in the case at bar, as in many others, refunds of overpayments were made years after the date of

redelivery. In *Sword,* the Government made no refunds after redelivery but entered into an arrangement in bankruptcy under which *Sword* made payments to the Government.

The *Sword Line* case further is not in any way representative of the other cases because of the intervening compromise and release in bankruptcy, which all the lower court judges decided was a bar to recovery, apart from the statute of limitations.

CONCLUSION

Because of the conflict between the Court of Claims and the Court of Appeals on the question of jurisdiction; because of the dissent by Judge Hand on the Court of Appeals with respect to statute of limitations; because this case involves a type of claim different from the *Sword Line* case bearing on the question of jurisdiction; because of the failure of the courts below to afford petitioner an opportunity to prove the allegations of the libel with respect to its agreement with the Government bearing on the date of commencement of the statute of limitations; and because in any event the courts below clearly erred in holding the petitioner's claim time barred; petitioner respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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Washington 5, D. C.,
Counsel for Petitioner.

John Cunningham,
Israel Convisser,
Of Counsel.

May 8, 1956.

APPENDIX

APPENDIX

APPENDICES C AND D

APPENDIX C

Judgment of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. HAROLD R. MEDINA, *Circuit Judge,*
HON. CLARENCE G. GALSTON, *District Judge.*

AMERICAN EASTERN CORPORATION, *Libelant-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellee.

/s/ A. DANIEL FUSARO,
Clerk

Appendix Annexed to Government's Brief in Court of Appeals

APPENDIX

Libelant's Memorandum in Opposition to Respondent's Exceptive Allegations

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 184-261

AMERICAN EASTERN CORPORATION, *Libelant*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

MEMORANDUM IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

I. INTRODUCTORY

Respondent has excepted to the libel herein on the ground that the two-year statute of limitations under the Suits in Admiralty Act expired before the libel was filed. Respondent contends that the statute commenced to run February 16, 1948; libelant that it commenced to run not earlier than March 12, 1953. The libel was filed February 16, 1955, within less than two years of the controlling date as contended by libelant.

During the years 1947 and 1948, libelant chartered vessels from respondent, acting through the Maritime Commission, under the provisions of Section 5 of the Merchant Ship Sales Act of 1946. Under the charter and the law, the Government participated in profits earned by libelant in excess of a certain basic charter hire fixed in the charter. Provision was made for what is termed cumulative accounting, that is, carry-forward and carry-back of losses, which would affect the extent of the participation in these profits by the Government.

The regulations issued under such Act, and the provisions of the charter, provided for the submission of periodic financial statements covering the operation of the vessels, and payment *on account* to the Government of amounts due as shown thereby. It was expressly provided that all accounts submitted by the operator were tentative and preliminary. The accounts were subject, first, to *initial* audit as submitted, and thereafter to a *final* audit after the operations were terminated and all items of expense and income were known, which customarily was not until several years after the operations were terminated.

In this case the Government completed its final audit of libelant's charter operations on February 18, 1953, and as shown by paragraph "SECOND" of respondent's exceptions, respondent made the last adjustment in the account on March 12, 1953 by refunding $603.60 to libelant. Therefore, it was not until March 12, 1953 that libelant could have, under established authorities relating to splitting of causes of action, successfully maintained this libel for review of its accounting and for refund of overpayments claimed but not refunded by the Government.

As will hereinafter be shown, under the express provisions of the regulations, the charter, and the audit procedures established by the Government, the accountings for charter hire were intentionally and deliberately kept open by the Government. Until the final entry in the account on March 12, 1953, the relationship between libelant and respondent under the charter was therefore clearly one of an "open account." Libelant's action, having been commenced within two years of such final entry, is therefore timely brought, and respondent's exceptions should be overruled.

II. APPLICABLE STATUTES AND REGULATIONS

The statutory provisions authorizing the charter of war-built vessels by the respondent and setting forth certain terms to be included in such charter contracts are

Section 5 of the Merchant Ship Sales Act of 1946 (60 Stat. 43; 50 U. S. C. A. App. § 1738) and Section 709 of the Merchant Marine Act of 1936 (49 Stat. 2010; 46 U. S. C. A. § 1199), which are quoted in Articles THIRD and FOURTH of the libel. The regulations deemed applicable by libelant are 46 CFR Subpart C—Charter of War-Built Vessels to Citizens (§§ 299.31-299.37-7).

III. STATEMENT OF FACTS

Bareboat charter contract MCe-42706 was entered into between libelant and respondent as of March 4, 1947. The first vessel was delivered under this charter on April 10, 1947 and the last vessel was redelivered on June 16, 1948. Respondent, on October 29, 1946, published regulations as to "preliminary determination and payment of 'additional charter hire'" (Appendix, Exhibit 1). These regulations were supplemented from time to time by instruction letters from respondent (Appendix, Exhibits 2, 3 and 4). The letters marked Exhibits 2 and 3 contain language to the following effect:

> "As in the instance of the instructions contained in the letter under reference, the foregoing instructions are issued for the guidance of charterers in the preliminary determination and payment of additional charter hire, upon the express understanding that neither their issuance by the Commission nor their observance by the charterer shall prejudice the rights of either under the applicable Charter Agreement, or otherwise, and that the Commission reserves the right to prescribe other bases for the determination of additional charter hire at the time of the annual or final accounting under the respective agreements."

The letter marked Exhibit 4 contains instructions that all preliminary accountings and remittances pursuant thereto shall not be construed as acceptance or approval of the accountings or to prejudice the rights of either party.

Pursuant to these regulations and instructions, libelant on various dates, some of which but not all are shown

in the respondent's exceptions, submitted preliminary accounting statements and made preliminary payments on account of 90 percent of the additional charter hire indicated to be due by such statements. In several instances, preliminary refunds were shown to be due to libelant, but the same were not claimed as it was apparent that subsequent adjustments would change the balance of the account.

On February 21, 1950, respondent published for the first time its regulations concerning "Procedure to be followed by Charterers in the Rendition to the Commission of Final Accountings under WARSHIPDEMISEOUT 203 and SHIPSALESDEMISE 303 Bareboat Charter Agreements", 46 CFR §§ 299.37-299.37-7. Additionally, these regulations contained the following pertinent provisions under the caption "Statement of Purposes and Reservations" (46 CFR 299.37-7(d) and (e)):

> "(d) That the esablishment of the rules and regulations prescribed in this procedure is without prejudice to the right of the Commission to determine upon the employment of other bases for allocation and calculation in any instance where, upon the completion of any annual or final accounting, the results produced by the application of the rules and regulations prescribed herein do not, in the judgment of the Commission, produce fair and reasonable results;
>
> "(e) That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such provisions shall govern;"

Thereafter, on September 14, 1951, in accordance with the aforementioned regulations, the final accounting under the contract, prepared by libelant, was submitted to respondent's New York office. This accounting was accompanied by public voucher dated September 14, 1951 in the amount of $10,187.12 representing refund claimed by libelant (Appendix, Exhibit 5). This accounting was

reviewed by the New York office of respondent, and certain adjustments were made to the accounting. On November 29, 1951, libelant was advised by its certified public accountants, who had consulted with respondent's representatives in New York, that the adjustments made reduced libelant's claim for refund by $1,750.24 (Appendix, Exhibit 6).

Thereafter, the report of the audit made by respondent's New York office was sent to Washington, and on March 19, 1952 libelant was advised by respondent's Comptroller that the New York report had been approved, subject, however, to further adjustments. The revised accounting indicated that libelant was entitled to a refund of $8,436.40 (Appendix Exhibit 7). Libelant's voucher, dated September 14, 1951, was accordingly adjusted and paid in the amount of $8,436.40 on April 25, 1952. Following this, the adjustments referred to in the letter of March 19, 1952 were made by libelant and an accounting showing such adjustments was submitted to respondent on November 18, 1952, together with a public voucher (Appendix, Exhibit 8). The revised accounting was reviewed by respondent's New York office and a report dated December 12, 1952, was sent to Washington for approval. By letter dated February 18, 1953, and received by libelant on February 20, 1953, respondent's Washington office advised libelant that the revised accounting had been approved (Appendix, Exhibit 9). The supplemental public voucher in the amount of $603.60 was sent to libelant on March 12, 1953, which date establishes the final entry in the account by respondent.

On February 12, 1955, libelant submitted a further revised accounting statement, together with public voucher in the amount of $10,202.62, claiming refund of the amounts of additional charter hire covered by the libel herein (Appendix, Exhibit 10). Respondent returned this public voucher and refused to make reimbursement of the amount claimed on February 25, 1955 (Appendix, Exhibit 11). The libel herein was filed by libelant on February 16, 1955.

IV. Argument

It is clear from the facts in the case that respondent, in drafting the contract, in promulgating instruction, and by its conduct in the course of dealing under these charters, intended and expressly prescribed that there should exist an open running account subject to a final audit by respondent. Clause 13 of the charter, which is quoted in Article Sixth of the libel, provided that the payments of additional charter hire on account "*shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due.*"

The regulations covering the rendition of preliminary accountings provided open running monthly statements to be submitted together with payments or account of 90 percent of the additional charter hire shown to be due. Specific reservation was made by respondent of the rights of both parties to final adjustment of the accounts. 46 CFR 299.37-2(a)(2). This is further emphasized by the fact that the procedure for final accountings was not promulgated until February 21, 1950, and even then contained reservations as to adjustments after final audit. 46 CFR 299.37-2(c). Finally, in this case, respondent did not advise libelant of a "final determination" until February 18, 1953, and did not make what it considered a "final adjustment" to the account until March 12, 1953. To illustrate the fact that such accountings under those charters are considered to be open until all adjustments have been made, we quote from information filed by the Maritime Administration with the House Merchant Marine and Fisheries Committee on or about February 25, 1955:

> "As of December 31, 1954, there were uncompleted a total of 191 charter audits covering charter operations commencing in calendar year 1946. Of this total, 150 are in our Atlantic Coast District. We expect in the period to June 30, 1956, to complete all outstanding charter audits in the New York District; we expect to complete all charter accountings in the

> Pacific and Gulf Coast Districts except 22 by June 30, 1956. We now have in effect a total of 8 charter operations involving 28 ships for which we will continue to receive charter accountings. In summary, therefore, with respect to our audit of charter operations, we feel that for the first time since 1946 we can look to the conduct of such audits on a current basis. Once a current status is attained, we intend to maintain our audit efforts on a current basis."

The contractual arrangement here confronting the court is similar in its essentials to that discussed in *City of Albany* v. *Leftwich*, 24 F. 2d 297; cert. den. 277 U. S. 599, 72 L. Ed. 1008. In that proceeding the contract arrangement was as follows: A street paving job for the defendant city was performed by the plaintiff. By the terms of this contract, the city engineer was to make a monthly estimate of the value of work performed during the month. On the basis of this estimate, and after approval by the chairman of the street committee, the plaintiff was to be paid 90 percent of the value of such work. Upon completion of the job, the city engineer was to make a final inspection and certify the completion of the work, together with its value. The amount shown by his estimate was thereafter to be paid, upon the street committee chairman's approval of such report and estimate. The Circuit Court of Appeals there held that the account upon which the contractor brought suit against the city was an open account. *Id.*, 299.

The law is clear that where an open account exists in connection with an entire and indivisible contract, the statute of limitations does not commence to run until the last item is entered in the account. The rule as to the time bar in respect of open accounts was stated by the District of Columbia Court of Appeals in *Anglo-Columbian Development Co.* v. *Stapleton*, 19 F. 2d 683, 685. The court there held that where the suit is upon an account, the cause of action accrues at the date of the last item of the account.

In an earlier proceeding in the same forum, *Smith* v. *Ross*, 31 App. D. C. 348, the court had for consideration

the suit brought by a building materials supplier against a builder to whom the supplier had contracted to furnish materials for the construction of 20 houses. The defendant builder pleaded the three-year statute of limitations. He contended, and asked the trial court to instruct the jury, that the suit was barred as to materials furnished more than three years before the action was commenced, notwithstanding that payments on account were made within three years before the action. The trial court refused so to instruct the jury, and was sustained by the Court of Appeals, which said of this point:

> "* * * the evidence tended clearly to show that appellee's contract was a continuing one to furnish materials for the 20 houses. Materials were delivered from time to time under their general contract, and the price thereof entered into a running account, upon which payments were made from time to time. We think the whole account must be considered as one account, with the element of mutuality running throughout the whole transaction. In such a case, the bar of the statute does not begin to run until the date of the last item appearing in the account."

In connection with a contract for the sale of casinghead gas and of dry or residue gas, the latter at a price to be determined after taking into consideration expenses incurred by the purchaser in the resale of such byproducts, the United States District Court for the Western District of Oklahoma, in *Haines* v. *Phillips Petroleum Co.*, 58 F. Supp. 777, held that there existed an open, running, mutual account; and it further held that the statute of limitations does not commence to run until the date of the last item in the account.

The question was considered by the Court of Appeals for the Second Circuit in *Judson* v. *Buckley*, 130 F. 2d 174; cert. den. 317 U. S. 679. This was an action for an accounting of various stock dealings in which the defendant represented the plaintiff as agent. The parties had mutual accounts which were to be settled only when their business ventures resulted in some profit. The court ruled that since under the agreement there could

be no final settlement until a profit was realized, the statute commenced running on the date of that stock sale which resulted in a profit.

There is another group of cases involving accounting disputes under Government contracts which are equally pertinent to the instant case. In such cases the contracts provided for the contractor to supply equipment to the Government or to perform certain work for the Government. Such contracts contained provisions providing for an adjustment of or increase in contract price by reason of changed conditions, usually an increase in labor or material costs. However, such adjustment was not to be made until review and approval of the contractor's accounting statements by the Government Contracting Officer. The Court of Claims has uniformly held, when the issue was raised, that the statute of limitations in connection with such adjustments does not commence to run until the Contracting Officer's review or audit has been completed and a liquidated amount obtained.

"When the Government puts an end to the contract, the right of the contractor to sue accrues at that time." *Holton Seelye & Co.* v. *United States,* 106 C. Cls. 477, 499 (1946); "The decisions of this and the Supreme Court, which we deem it unnecessary here to discuss, are to the effect that a claim accrues within the meaning of the limitation statute applicable to this court when all of the events have happened which entitle a claimant to bring suit thereon." *Dionysia E. Tserioni* v. *United States,* 94 C. Cls. 142, 148 (1941); "Ordinarily a cause of action accrues when the service is rendered or the articles are furnished and the obligation to pay therefor arises, but this is not a hard and fast rule and whether the cause of action in a particular case accrues at such time depends upon the agreement or arrangement between the parties. Their express agreement as to this in the case of a formal contract or their understanding and course of conduct under an implied contract may fix a different time for the accrual of the claim for the purpose of computing the statute of limitation." *Manufacturers Aircraft Assn.* v. *United States,* 77 C. Cls. 481, 522-3 (1933); see also *Austin Engineering Co.* v. *United States,* 88 C.

Cls. 559 (1939); *Electric Boat Co.* v. *United States*, 81 C. Cls. 361 (1935); cert. den. 297 U. S. 710; *Penn Bridge Co.* v. *United States*, 71 C. Cls. 273 (1930).

The facts in this case, which have been outlined above, fits squarely within the foregoing legal principles. Here the respondent:

1. Drafted the contract to provide for preliminary payments subject to adjustment *after final audit* by it.

2. Promulgated preliminary instructions subject to revision and without prejudice to the rights of either party.

3. Required *preliminary* accounting statements with *preliminary* payments *on account* of 90 percent of the amounts tentatively shown to be due. Such statements were to be revised monthly with further payments or refunds to be made as appropriate. Such accountings and payments were specifically stated by respondent to be without prejudice to the rights of either party.

4. Did not publish until February 21, 1950 its *procedure* for *making annual and final accountings.*

5. Did not complete its *final review* and *determination* as to libelant's accounting and make refund to libelant on the basis of such audit until March 12, 1953.

Under these circumstances there can be no doubt that respondent deliberately and carefully, by its own contract, regulations and procedures, set up an open account subject to adjustment and revision until the completion of final audit or determination by respondent.

There exists, in addition to the foregoing, the strong possibility that even if libelant had brought suit on any of the preliminary payments, it would have been met by the claim of prematurity. In the alternative, if judgment had been reached, libelant could have been held to have forfeited its rights to later claims under the same contract by suing for one portion of an indivisible contract. *Baird* v. *United States*, 96 U. S. 430 (1878); *McShain Co., Inc.* v. *United States*, 87 C. Cls. 601 (1938).

For the reasons stated herein, libelant respectfully requests that respondent's Exceptions be overruled.

RADNER, ZITO, KOMINERS
& FORT
Radner, Zito, Kominers & Fort
Office and P. O. Address
529 Tower Building
1401 K Street, N. W.
Washington 5, D. C.

HAIGHT, GARDNER, POOR
& HAVENS
Haight, Gardner, Poor
& Havens
Office and P. O. Address
80 Broad Street
New York 4, New York
Proctors for Libelant

State of New York,
County of New York—ss.:

FRANK W. PHILLIPS, being duly sworn, deposes and says that he is the Treasurer of American Eastern Corporation, the libelant herein; that he has read the foregoing memorandum in opposition to respondent's exceptive allegations and knows the contents thereof; and that the facts stated therein are true of his own knowledge and that the documents contained as exhibits in the Appendix thereto are true copies of such documents.

FRANK W. PHILLIPS

Sworn and subscribed to before me
this 6th day of May, 1955.
Gabrielle Fliegans
Notary Public
GABRIELLE FLIEGANS
Notary Public, State of New York
No. 31-6336000
Qualified in New York County
Certs. filed with N. Y. Co. Clk. & Reg.
Commission Expires March 30, 1956

APPENDIX D

Statements of Maritime's position that payments of additional charter hire were preliminary until final audit at which time refunds would be due and to which time all rights were reserved. (Emphasis supplied).

1. *Regulations*

Supplement 8 to General Order 60, 11 F. R. 13215, 46 CFR 299.31(k)(1); see also pp. 29a-30a of Appendix A:

> *Such payments shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Commission* covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise.

Supplement 21 to General Order 60, 15 F. R. 1789, 46 CFR 299.37-2(a)(1):

> Clause 13 * * * prescribes the fundamental bases for the calculation and payment to the Commission of additional charter hire. The * * * clause * * * provide[s], among other things, for preliminary payments by the Charterer to the Owner on account of additional charter hire, subject to adjustment *upon completion of final audit* by the Owner, *at which time such payments will be made by or to the Owner as such final audit may show to be due.*

2. *Instructions*

Maritime's circular of May 14, 1951; see also pp. 41a-42a of Appendix A:

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Ad-

ministration and is *subject to adjustment upon the completion of final accounting* between the Charterer and the Maritime Administration *and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise.*

3. *Trust account*

Payments of additional charter hire made to Maritime were deposited by it in a trust account "13X6869 Unearned Moneys, Merchant Ship Sales Act, War-built Vessels." Maritime has made numerous refunds of overpaid additional charter hire, and the Government vouchers disclose that such refunds were made out of that trust account. The trust character of this account was referred to by the Comptroller General in his response (no. B-83880, dated April 22, 1954, 33 Comp. Gen. 503) to an inquiry from the Secretary of Commerce with respect to the use of funds in Account 13X6869. The Comptroller General said:

> Incident to the chartering and sales of war-built vessels pursuant to [the Ship Sales Act], the Commission received advance payments on charter hire and deposits accompanying applications for purchase of those vessels. Those receipts did not represent "earned" moneys when first received and in those instances where charters were terminated prior to the expiration of the periods covered by the advance payments or where applications for the purchases of vessels did not consummate in sales, refunds or adjustments were required. In order to facilitate the payment of such refunds or adjustments, the subject trust account was established by Accounts and Procedures Letter No. 11240, dated January 27, 1947, pursuant to Office decision of January 15, 1947, B-39802, B-62804.

4. *Correspondence and course of dealings*

Letter of December 15, 1954, from Wesley Clark, Chief, Division of Credits and Collections, Maritime Administration, to Blidberg Rothchild Co. Inc.:

> Under the terms of the agreement quoted in part [clause 13] above, your company is indebted to the United States for additional charter hire at this time and has been requested to pay such additional charter hire. If payment is not received in this office within fifteen (15) days from the date of this letter, a Government-wide setoff payment order will be reissued against your company.

Letter of December 30, 1954 from A. R. Boone, Acting Comptroller, Maritime Administration, to Blidberg Rothchild Company Inc.:

> This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreement are binding upon your Company to pay such amounts as were billed to you with the understanding that the refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.
>
> Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.
>
> Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954.

Letter of December 10, 1954 to Prudential Steamship Company from the Chief, Division of Credits and Collections, Maritime Administration:

> In accordance with the provisions of Clause 13 * * * this money is now due the Maritime Administration and any adjustments and/or refunds would be made after supplementary accountings are submitted.

Letter of July 15, 1955 from the Chief, Division of Credits and Collections, Maritime Administration, to James Griffiths & Sons:

> From the provisions of Clause 13 quoted in our letter of May 19, 1955, it is evident that situations such as you point out in your letter were anticipated at the time of entering into the contracts, and in view thereof, *provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.*
>
> * * * * * * *
>
> Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that *if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded.*

Letter of March 8, 1955 to North Atlantic & Gulf S.S. Co. from Chief, Division of Credits and Collections, Maritime Administration:

> Under the terms of the Agreements quoted in part, above, your company is indebted to the United States for additional Charter Hire at this time.
>
> In reference to the last paragraph of your letter calling our attention to the fact that your Company has a suit pending against the United States Government; we fail to see how this pending suit has any bearing whatsoever on the payment of the subject

invoices, for amounts due this Administration pursuant to the provision of the Charter Agreements, and binding upon your company to pay.

Accordingly, it is requested that you remit the amounts presently established as being due the United States for additional Charter Hire and promptly take the necessary action to finally resolve with our District Comptroller the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the Charter Agreement.

Agreement by the Government that the Cause of Action is Founded Upon Statute

Excerpts from Government's Brief, *American Eastern Corporation* v. *United States,* Court of Appeals Second Circuit.

page 11—"* * * the gist of appellant's cause of action still remains the violation of the Acts of Congress * * *".

page 12—"Appellant's suit, founded upon a statute which it alleges imposes an obligation to charter government vessels for bareboat use at a specified rate of hire, is maritime in character and within admiralty jurisdiction."

page 18—"Appellant has rightly insisted that its cause of action is not founded on the charter but upon the Act of Congress and its alleged violation by the Government."

page 20—"In the present cases, therefore, the initial exaction of the contract in alleged violation of the Act of Congress would give appellant a right to at least nominal damages."

page 25—"Appellant's supporting contention * * * fails to take into consideration that the claims in question are founded on the statute's violation, not on the contract."

Excerpt from Government's memorandum in support of motion, filed April 27, 1956, in the Court of Claims, to take plaintiff's motion for summary judgment from the calendar in *Smith-Johnson Steamship Corp.* v. *United States.*

page 1—"The principal cause of action in each of such 75 suits, whether filed in this Court or in admiralty, is a maritime cause of action founded upon Acts of Congress seeking recovery of alleged illegal exactions of charter hire."

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1956)

No. 98-55

SMITH-JOHNSON STEAMSHIP CORP.

v.

THE UNITED STATES

No. 262-55

PACIFIC FAR EAST LINE, INC.

v.

THE UNITED STATES

No. 314-55

BLACK DIAMOND STEAMSHIP CORP.

v.

THE UNITED STATES

Mr. Arthur M. Becker for plaintiff in case No. 98-55; *Messrs. Melvin Spaeth, Gerald B. Greenwald,* and *Becker & Maguire* were on the briefs. *Mr. J. Franklin Fort* for plaintiff in case No. 262-55; *Messrs. Radner, Zito, Kominers & Fort,* and *Israel Convisser* were on the briefs. *Mr. George F. Galland* for plaintiff in case No. 314-55; *Messrs. William J. Lippman, Robert N. Kharasch,* and *Galland & Kharasch* were on the briefs.

Mr. Leavenworth Colby, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant.

ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SPECIAL DEFENSE IN CASE NO. 98-55, AND ON DEFENDANT'S MOTIONS TO DISMISS IN CASES NOS. 262-55 AND 314-55.

Opinion

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff alleges in the *Smith-Johnson Steamship Corporation* case that the defendant exacted from it for the hire of certain vessels more than was authorized by the Merchant Ship Sales Act of 1946 (60 Stat. 41), 50 U. S. C. App. 1735, et seq., and the Merchant Marine Act of 1936 (49 Stat. 1985), 46 U. S. C. 1101, et seq. It sues for the excess. Defendant in its answer sets up the special defense that this court lacks jurisdiction of the subject matter, because, it says, plaintiff's cause of action is on the contract for the hire of the vessels and is, therefore, maritime in nature, of which actions the admiralty courts have exclusive jurisdiction. Plaintiff says its action is on the statute and it moves to strike defendant's special defense.

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels. Section 5 (b) authorized the United States Maritime Commission to fix the charter hire for vessels at such rates as the Commission should determine to be consistent with the policy of the Act. Plaintiff says that, in fixing the charter hire for the vessels chartered to it, the Commission went contrary to the policy of the Act in that it exacted from it a stated hire and in addition percentages of its profits on the voyages of the vessels in excess of the percentages authorized by the Act.

Section 5 (c) of the Act incorporated section 709 (a) of the Merchant Marine Act of 1936 (49 Stat. 1985, 2010) which provided:

> Every charter made by the Commission, * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of

such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter agreement tendered plaintiff by the Maritime Commission provided for a basic charter hire and also for additional charter hire as follows:

Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of the vessels (all as hereinafter defined), the charterer shall pay over to the owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of

$300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 "WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Plaintiff says this charter agreement exacted a percentage of its profits in excess of that authorized by law. Nevertheless, the charter agreement was executed and eight vessels were delivered to plaintiff. While the charter agreement was in effect plaintiff made preliminary payments of additional charter hire to defendant, pursuant to clause 13 of the agreement, quoted above, totalling the sum of $613,395.32. By final audit completed on February 4, 1955, defendant determined that, at the time of the audit, a total of $616,063.04 had accrued to defendant as additional charter hire under the charter agreement, which was paid on demand. Plaintiff seeks to recover $231,773.81 of the amount paid defendant as additional charter hire, on the ground that the contract exacted this much more than was authorized by law.

The issue presented is whether plaintiff's claim is on the contract, and, therefore, maritime in nature, of which the district courts have exclusive jurisdiction, or is a claim based on the statute, of which this court is given jurisdiction by section 1491 of Title 28 U. S. C.

Defendant says the action is maritime under both the Public Vessels Act and the Suits in Admiralty Act. The Public Vessels Act is not applicable because the vessels involved herein are not public vessels; only the Suits in Admiralty Act is pertinent. This Act confers exclusive jurisdiction on the district courts only in situations where, if the vessels were privately owned, a proceeding in admiralty could be maintained. *D. C. Andrews & Co.*, v. *United States*, 129 C. Cls. 574. If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law authorized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction.

Defendant relies upon *Krauss Bros. Co.*, v. *Dimon S. S. Corp.*, 290 U. S. 117, but in this case, plaintiff's claim was based on the contract, and not on the ground that the contract had exacted more than the law allowed. Plaintiff alleged that it had paid more for the carriage of freight than was due under the contract and sought to recover the amount of the overpayment. Admiralty had jurisdiction because the suit was on a maritime contract. The case is not in point on the question before us.

In *Archawski* v. *Hanioti*, 223 F. 2d 406, the Court of Appeals for the Second Circuit said that an action by prospective passengers to recover money paid for passage on a vessel that never sailed was a common law action of *indebitatus assumpsit*, of which the admiralty courts had no jurisdiction. The Supreme Court granted certiorari, and it may be it will hold that the action was for a breach of a maritime contract, of which the admiralty courts have jurisdiction; but, even so, such a decision could not affect the decision of this case, since we think this is a suit based not on a contract, either maritime or at common law, but on a statute.

The Second Circuit, in an opinion by a pre-eminent jurist, decided *Sword Line, Inc.*, v. *United States*, 228 F. 2d 344, in which it took a view contrary to what we have expressed. It said in effect that the parties are presumed to have agreed on a hire for the vessels no greater than the law allowed and, hence, that the suit for excesive exaction was a suit on the contract, of which the courts of admiralty have jurisdiction. But no such presumption can be indulged in the case at bar, because it is contrary to the facts. The parties in fact did agree on a hire greater than the law allowed—taking the allegations of the petition to be true.

If the Government is not entitled to retain the excess, it is not because plaintiff did not agree to pay it, but because the statute did not authorize the exaction of so much. If plaintiff is entitled to recover, it is because its rights under the statute have been violated, not its rights under the contract.

For the reasons stated, we conclude that the plaintiff's cause of action is non-maritime in nature, and is one which could not be maintained in a court of admiralty. Accordingly, the claim falls within the jurisdiction of this court, and plaintiff's motion to strike defendant's special defense of want of jurisdiction is granted.

Defendant, in cases Nos. 262-55 and 314-55, has moved the court to dismiss for lack of jurisdiction. Relative to the question of jurisdiction, the causes of action asserted in the petitions of the respective plaintiffs in these cases are identical to the cause of action asserted in *Smith-Johnson Steamship Corporation* v. *United States*, No. 98-55. For reasons stated above, we hold that this court has jurisdiction over the subject matter of these causes of action. Therefore defendant's motions to dismiss for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 934

AMERICAN EASTERN CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

For the reasons stated in our memorandum in No. 861, *Sword Line, Inc.* v. *United States*, we do not oppose the granting of a writ of certiorari in the present case although we believe the court below correctly decided both that the United States district courts have exclusive jurisdiction under the Suits in Admiralty Act of all quasi-contract claims for overpayment of charter hire for the use of Government vessels—even though the claim is founded upon Acts of Congress—and that such

quasi-contract causes of action do not accrue subsequent to the redelivery of the vessels, but arise immediately upon the violation of the statute.

This case was decided by the Court of Appeals *per curiam* upon the authority of its prior decision in the *Sword Line* case.[1] After the decision of the court below in the *Sword Line* case but before the ruling in the present case, the Court of Claims expressly rejected the reasoning of the Second Circuit, held that admiralty had no jurisdiction in this situation, and decided four cases[2] in admitted conflict with *Sword Line*. While we believe that it is the ruling of the Court of Claims which is erroneous, it will be some time before any of the four cases decided by that court are in a posture for this Court's review.[3] Seventy-five similar cases are meanwhile being held in abeyance in district

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[1] 228 F. 2d 344, confirmed on rehearing, 230 F. 2d 75.

[2] *Smith-Johnson S. S. Corp.* v. *United States*, Ct. Cls. No. 98-55; *Pacific Far East Lines, Inc.* v. *United States*, Ct. Cls. No. 262-55; *Black Diamond S. S. Corp.* v. *United States*, Ct. Cls. No. 314-55; *Marine Transport Lines, Inc.* v. *United States*, Ct. Cls. No. 242-55; all decided March 6, 1956, and not yet reported.

[3] A petition for certiorari has been filed by one of the plaintiffs, *Smith-Johnson S. S. Corp.* v. *United States*, No. 898. The petition asks this Court to review an order of the Court of Claims which sustained petitioner's own motion to strike from the Government's answer the defense of lack of jurisdiction of the subject matter by reason of the exclusive Suits in Admiralty Act jurisdiction. But at the same time petitioner has moved for a summary judgment of liability and the Court of Claims, over the Government's objection, has set the motion for argument on the June calendar. Meanwhile, the Government's motion for rehearing on the question of jurisdiction is still pending in the Court of Claims. See the Government's memorandum in No. 898.

courts of five of the circuits as well as in the Court of Claims, and the early resolution of the existing conflict appears desirable from the standpoint of orderly administration of justice.

For the foregoing reasons, we do not oppose the granting of the writ of certiorari in this case.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MAY, 1956.

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